1. The children of the author are as much objects of the author's natural bounty as the widow;

2. There is no qualifying phrase between "widow . . . or children of the author" to separate one from the other as enumerated classes;

3. An earlier draft of the Copyright Act had had such a qualifying phrase;

4. If the widow and children are not to be considered as constituting one class but as separate classes, neither would have an absolute priority, but a race to file an application would ensue, with the prize going to the swiftest; and

5. The mere physical position of the word "widow" as preceding the word "children" does not indicate an intent to create a priority.

In developing its opinion upon this pattern, the Court of Appeals, we submit, erred in failing to attach adequate significance to the construction of the sentence, and to the utilization of the word "or".

It would seem only logical that if Congress had intended to create a single class, it would have utilized the word "and" to define the combined status of the widow and the children. Only in that event would there have been no significance in the juxtaposition of the words "widow" and "children".

Nor, we submit, was the Court correct in considering the disjunctive to apply only to the act of filing an application for renewal (R. 56). That interpretation would seem to disregard the physical construction of the statutory provision

which speaks in terms of the persons "entitled" to the renewal. It is only after the enumeration of the persons entitled to the renewal that the statutory provision refers to the making of an application.

The reasoning that Congress intended to treat an author's widow and children on a parity because they are equally the object of his bounty, fails to take into account traditional distinctions made by the law in economic protection for widows and for children. The entire philosophy and public policy upon which the widow's dower right was predicated, expressed a special solicitude for widows. Systems of community property, prevalent in a number of our States, obviously give to the wife a status different from that accorded to children. Decedent estate laws, such as that of New York (Decedent Estate Law, § 18), which inhibit the disinheritance of a wife, although not of children, make a similar distinction. Consequently a statutory grant of an economic benefit to a widow prior in status to that of children is in accord with tradition.

A study of the literature on copyright indicates that many writers do not deal with the question of the relative status between the widow and children, but only refer to the doctrine that the new grant is created for the benefit of the persons "enumerated" in the statute "in the order" of their enumeration.

However, some writers have been more specific. It is significant that two of the outstanding authors on copyright, both of whom lived through the birth of the 1909 Copyright statute, expressed the view categorically that the surviving spouse—widow or widower—held a separate status in priority to that of the children. Richard C.

DeWolf, Esq., whose lectures on copyright were published in 1925 (AN OUTLINE OF COPYRIGHT LAW), says (pp. 65-66):

> "The renewal can only be obtained by the beneficiaries expressly named in the law, and by them in the order named, i.e., the person having the first right is the author, if living at the end of the original term; if he is not living, then the widow or widower, is entitled to renew; if there is no widow or widower, the children come in; in their absence, the executor of the author's will; and finally in the absence of all other beneficiaries and the intestacy of the author, the author's next of kin are entitled to the renewal."

Mr. DeWolf was not a casual commentator nor is his book the work of a person lacking expertness in this branch of law. He had been associated with the Copyright Office for many years. The introduction to his work was written by Thorvald Solberg, Esq., then Register of Copyrights (pp. xix-xxiv), and the preface indicates (p. vi) that much of the manuscript had been read by Mr. Herbert A. Howell, one of his colleagues in the Copyright Office.

Although Mr. Howell's own book THE COPYRIGHT LAW fails to clarify the instant question, he gives an indication of the view that the surviving spouse takes precedence over the children, in a contribution to a compilation of International Copyright Law. In the H. L. Pinner's compilation 2 WORLD COPYRIGHT (1954), Mr. Howell's statement reads as follows (p. 352):

> "The death of an author affects only such copyrights or common law rights as he had not already absolutely disposed of to another. But whether or not he had so disposed of his copyrights, the right

> of *renewal* would devolve upon the surviving spouse, children, executor or next of kin of the author in the order named, by virtue of Section 24 of the Copyright Act (Fox Film Co. v. Knowles, 261 U. S. Rep. 326 1923)."

Arthur W. Weil, Esq., in his well known work AMERICAN COPYRIGHT LAW, published in 1917, makes the following statement (p. 365):

> "Except in the cases which have been specified, where the proprietor is entitled to a renewal copyright, the persons hereinafter named are entitled to a renewal or extension, if living, in the order named: the author, his widow or her widower, the author's children, or executors, or next of kin, if there be no will."

As Mr. Weil paraphrased the statute and punctuated his sentence, there can be no doubt of either the existence of a priority, or its order.

In recent years some text writers have suggested a different interpretation.

Samuel W. Tannenbaum, Esq., in a lecture reprinted in 7 COPYRIGHT PROBLEMS ANALYZED (CCH 1952, p. 12) expressed the opinion that the widow and children should be considered to be members of a class. It was this writer's contention that an injustice would be done in holding that the children of an author who had been married several times would be excluded from an interest in the renewal by a widow who was not their mother.

Writing in the Columbia Law Review, Theodore R. Kupferman, Esq. (44 Col. Law Rev. 712) says (p. 717, note 28):

> "It is submitted that the spouse does not take precedence but the spouse and children hold together as tenants in common."

No reason is given for this submission nor is the question analyzed by the writer.

On the other hand, Samuel Spring, Esq., in RISKS AND RIGHTS IN PUBLISHING TELEVISION RADIO ADVERTISING AND THE THEATRE (1952), says in a footnote (4a. p. 310):

> "As to whether, in the case of a deceased author leaving a widow and children, the Benefits of the right of renewal are solely in the widow, without any right of sharing by the children, there are no decisions. The language of Sec. 24, C. S., fairly construed, indicates that only the widow has the right of renewal, even if there be a surviving widow and children of a deceased author. Renewal by the widow alone is the established practice as to renewals in such circumstances. As to whether or not the children nevertheless have a right to require the widow to hold part of the property in trust for them, there are no decisions. It would seem that the Federal language of Sec. 24 confers the benefits of renewal on the widow alone, even if there be surviving children, and the state laws of inheritance whereunder children usually share with the widow, in the case of an intestate spouse, cannot prevail over the Federal statute. Here again we have an example of the unfortunate obscurities in the Copyright Statute."

A significant text may be one which is not a lawbook at all. A MANUAL OF COPYRIGHT PRACTICE, by Margaret Nicholson was published in 1945. The author states in her preface (p. vii) that the book is not for copyright lawyers

or students, but one for the author, editor, agent—in short, the layman.

It is not an unfair assumption that an individual writing for this practical purpose, after consulting with the various persons mentioned in the preface and acknowledgments, would express a viewpoint generally accepted in business circles.

Miss Nicholson undertook in Part III of her book to clarify copyright practices by means of questions and answers (pp. 167-198). Concerning renewals, the following question and answer appears (p. 197):

(p. 197)

"The law says if an author is dead, the renewal must be obtained by his wife, or his heirs, or the executor named in his will. If the wife also dies, should the renewal be obtained by her executor or the executor in the author's will (presuming they are different executors, of course)?

The answer given is:

"The Copyright Act stipulates that if an author is dead the renewal may be made by

I. His widow. If there is no widow, by

II. His child. If there are no children, by

III. The author's executor. If he died intestate, by

IV. The author's next of kin.

Legally adopted children may qualify as II. Under IV, actual blood relatives are qualified—not a sister-in-law, uncle by marriage, et cetera.

From this it follows that the wife's executor could in no circumstances be qualified to make the renewal."

Although mere antiquity of statement is no guarantee of wisdom, and though an interpretation of a statute by a layman may ordinarily have little validity, it is submitted that the construction given to the statute by Messrs. DeWolf and Weil and Miss Nicholson is entitled to great weight in the present circumstances. It is our belief that this construction of the statute has been widely acted upon by authors, publishers and by other users of copyrighted material.

The affirmance of the decision arrived at in the Court of Appeals would lead to much confusion and a chaotic condition.

If children of deceased authors are co-owners with widows, they are entitled to an accounting of the monies received by the widows from the utilization of the renewal copyrights. The doctrine of *Carter* v. *Bailey*, 64 Maine 458, referred to by Judge Fee in his dissenting opinion, has not been followed in cases such as *Shapiro-Bernstein & Co., Inc.* v. *Jerry Vogel Music Co., Inc.*, 73 F. Supp. 165, and *Jerry Vogel Music Co., Inc.* v. *Miller Music, Inc.*, 272 App. Div. 571, aff'd 299 N. Y. 782.

The present decision may therefore lead to a flood of litigation. Widows who have dealt with renewal copyrights, and the collaborators of authors and users of copyrighted material who have dealt with widows face the possibility of numerous claims for accounting by children. The atmosphere would be further complicated by the cir-

cumstance that obligations have been created, tax payments have been made and other liabilities have been incurred in various transactions which might now have to be reviewed.

In addition, there will be many questions relating to the grants of licenses and of the exclusivity of grants already made. If widows and children constitute a single class, an important element of copyright, namely, its exclusivity would be impaired.

In many instances the children who have survived authors are infants. This raises additional problems—problems both with respect to accountings, distribution of their avails of utilization of renewal copyrights, and the making of agreements in respect of copyrighted works. Transactions which have heretofore been considered valid when entered into by the widows of authors may require the application to probate courts for approval.

We respectfully submit that in the absence of a clear demonstration that the statute requires the widow and children to be treated in one class, and as co-owners of the renewal copyright, a construction to that effect should be avoided. If the widow has no priority the economic value of the renewal copyright to her will be diminished. In place of the widow's security, she may have only a small share of the proceeds derived from the renewal copyright.

POINT II

The term children should include only those who are legitimate.

We leave to the respective parties the argument of the question whether under California law the infant party enjoys the right of a legitimate child of the deceased author. May we urge, however, that there is no indication that Congress, in employing the term "children" in the year 1909, departed from the conventional view that only legitimate children were intended.

Respectfully submitted,

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of Counsel

No. 529

In the Supreme Court of the United States

OCTOBER TERM, 1955

MARIE DESYLVA, PETITIONER

v.

MARIE BALLENTINE, AS GUARDIAN OF THE ESTATE OF STEPHEN WILLIAM BALLENTINE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE REGISTER OF COPYRIGHTS AS AMICUS CURIAE

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THE ISSUES INVOLVED

Pursuant to 17 U. S. C. 24 [1] a copyright endures for a term of twenty-eight years; it may be renewed for a second term of equal duration. The statute provides that the following persons are entitled to such renewal:

> * * * the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or chil-

[1] Title 17 of the United States Code was enacted into positive law by Section 1 of the Act of July 30, 1947, 61 Stat. 652.

> dren, be not living, then the author's executors, or in the absence of a will, his next of kin * * *.

In the instant case the author died before most of his compositions became eligible for renewal. He was survived by his widow and by an illegitimate child. The question presented is whether the renewal right vests exclusively in the surviving spouse or whether the widow and children constitute a class who share the copyright as cotenants.

INTEREST OF THE REGISTER OF COPYRIGHTS

Copyright for the second or renewal term of twenty-eight years is secured under Section 24 only when:

> * * * application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright * * * in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication. * * *

Only those within the classes specifically enumerated in Section 24 are eligible and the application must be filed in the Copyright Office within the statutory time limits.

At the outset of this proceeding both parties asked the Copyright Office to state its practice

on the particular point at issue.[2] The Principal Legal Advisor of the Copyright Office wrote parallel letters to the parties.[3] Certain statements have also been made as to the functions of the Copyright Office in this area.[4] The dissenting opinion of the court below raises questions as to the necessity of certain administrative action by the Copyright Office before adjudication.

It is believed that this memorandum may be helpful in clarifying these problems.

DISCUSSION

Respondent and the court below read the statute as providing for four classes of persons successively entitled to the renewal of the copyright—*i. e.*, the author; the widow, widower, *or* children; the executor; and the next of kin—and that there are no preferential rights among the members of the same class. Petitioner, on the other hand, urges that the courts may not disregard the use by Congress of the disjunctive "or", especially since in testamentary and similar transfers *mortis causa* the term "or" has an established substitutional meaning. Hence, she takes the position that the statutory text constitutes a succinct and technically correct way of

[2] Petitioner also asked the Office to state its position on the question of whether an illegitimate child was a child within the meaning of 17 U. S. C. 24. The Register takes no position on this issue.

[3] See App. A, *infra*, pp. 20–24, for the longer letter.

[4] See, *e. g.*, Motion of ASCAP for Leave to File a Brief Amicus Curiae, p. 4.

expressing a congressional purpose which, if spelled out, would read more clumsily:

> to the author of such work, if still living, or to the widow or widower of the author, if the author be not living, or if such author, widow or widower be not living, to the children of such author.

Legislatures, including Congress, however, have been notoriously so lax in the use of the words "and" and "or" that the mere selection of either term by itself cannot serve as any safe indication of the legislative purpose. *United States* v. *Fisk*, 3 Wall. 445, 447; *United Starch & Refining Co.* v. *National Labor Relations Board*, 186 F. 2d 1008, 1014 (C. A. 7); Sutherland, *Statutes and Statutory Construction* (3d Ed.), Vol. 2, Section 4923.

In order to assist the Court in ascertaining the meaning of the clause "widow, widower, *or* children" we shall set forth the historical development of the pertinent portions of the renewal clause of 17 U. S. C. 24 and of the regulations and official instructions under the various statutes.[5]

1. *The Act of 1790.*

The first federal copyright statute, the Act of May 31, 1790, 1 Stat. 124 provided[6] for a copy-

[5] For the development of the renewal provisions of the copyright statute, in general, see *Fisher Co.* v. *Witmark & Sons*, 318 U. S. 643, interpreting 17 U. S. C. (1940 Ed.) 23. 17 U. S. C. (1940 Ed.) 23 is identical with 17 U. S. C. (1952 Ed.) 24.

[6] Section 1, 1 Stat. 124.

right term of 14 years with a right of renewal for another term of 14 years if the author was living at the expiration of the first term. However, if the author did not survive the first term of fourteen years, the copyright was terminated regardless of the needs of his family (7 Debates in Congress, Appendix CXIX).

2. *The Act of 1831.*

The Act of February 3, 1831, 4 Stat. 436, brought about two important changes. It enlarged the first term from fourteen to twenty-eight years; it also provided that if the author did not survive the original term the renewal interest would not fall into the public domain but would pass to the author's surviving widow and children (cf. *Fisher Co.* v. *Witmark & Sons,* 318 U. S. 643, 650–651).

Section 2 of the 1831 Act (4 Stat. 436) provided in the part here pertinent:

> * * * if, at the expiration of the aforesaid term of [twenty-eight] years such author * * * be still living * * * or being dead, shall have left a widow, or child, or children, either or all then living, the same exclusive right shall be continued to such author * * * or, if dead, then to such widow *and* child, or children, for the further term of fourteen years * * *. [Emphasis added.]

Petitioner takes the position (Pet. Br. 13) that under Section 2 of the 1831 Act the widow clearly

shared the renewal right. Section 16 of the 1831 Act dealing with the renewal of copyrights granted under the 1790 statute is less explicit; it gives the renewal right to the author's "widow, child or children".

3. *The Act of 1870, the Revised Statutes, and the Amendments of 1891.*

Under the Act of July 8, 1870, Section 88, 16 Stat. 212, the renewal right was given "to the author * * * if he be still living * * * or his widow or children, if he be dead * * *." In the absence of committee reports and of pertinent debate on the specific problem, we cannot say whether or not the substitution of the "or" for the "and" contained in the 1831 Act was intentional or merely an example of the almost proverbial looseness in the use of "and" and "or". But see the statements in respondent's brief at pp. 16–17.[7]

We shall show, however, in the following part of this memorandum that the renewal provisions of the subsequent amendment to, and reenactments of, the copyright statute[8] retained the clause "widow, [widower] or children," and that

[7] Petitioner's argument is based on the difference between the clause "widow and child, or children" used in the 1831 statute and "widow [widower] or children" used in the subsequent legislation.

[8] See also, *infra*, the various statements to the effect that subsequent legislation practically reenacted the 1831 statute.

[9] R. S. 4954, the Amendments of 1891, the Copyright Act of 1909, and the codification of 1947.

the judicial and administrative interpretation of the copyright acts since 1870 has been that they were not intended to interfere with the rights granted by the 1831 statute, but merely to extend them and to prevent the lapse of the right into the public domain by providing for new contingent classes of beneficiaries.

The first published Directions for Securing Copyrights of which we are aware were issued in 1874. To the extent that they are here of interest they provide:

> 6. Each copyright secures the exclusive right of publishing the book or article copyrighted for the term of twenty-eight years. At the end of that time, the author or designer, or his widow or children, may secure a renewal for the further term of fourteen years, making forty-two years in all.[10]

In 1878, Section 88 of the 1870 statute became, without change, Section 4954 of the Revised Statutes. The Act of March 3, 1891, Section 2, 26 Stat. 1107, amended R. S. 4954 by eliminating the restriction of copyrights and the renewal thereof

[10] The Directions issued in 1883, 1891, 1893 and 1895 use the following similar language:

"6. The original term of [a] copyright runs for twenty-eight years. *Within six months before* the end of that time, the author or designer, or his widow or children, may secure a renewal for the further term of fourteen years, making forty-two years in all." [Emphasis in the original.]

The article "a" in brackets is found only in the Directions of 1895.

to residents and citizens of the United States. It did not modify the "widow or children" clause.

Beginning March 1, 1899, the Directions for Registration of Copyright (Copyright Office Bulletin No. 2) provided with respect to the renewal of copyrights: [11]

> *Within six months before* the expiration of the first term of the copyright,[12] the author, if he is still living, or his widow or children, if he is dead, can have the copyright continued for a further term of fourteen years. [Emphasis in the original.]

Thus, in contrast to the regulations which had been in effect from 1874 to 1899, Copyright Office Bulletin No. 2 provided expressly that while he was alive the author alone could apply for the renewal, but that after his death application could be made by the widow or children.

The Report on Copyright Legislation by the Register of Copyrights, Mr. Thorvald Solberg, dated December 1, 1903, took the position (at p. 12) that "The stipulation of the act of 1831 [on the exercise of the right of renewal by the author, or his survivors] was substantially followed by the act of 1870, the Revised Statutes, and the act of March 3, 1891."

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[11] Subsequent editions of Copyright Office Bulletin No. 2 were published in July 1899, May 1900, July 1901, 1904, 1905 and 1906.

[12] The 1905 and 1906 editions of Copyright Office Bulletin No. 2 inserted at this place the clause "the copyright statutes provide (Revised Statutes, section 4954) that."

4. *The Copyright Acts of 1909 and 1947.*

During the involved genesis of the Copyright Act of March 4, 1909, the early bills provided for a single copyright term for the life of the author and for fifty years thereafter (*Fisher Co.* v. *Witmark & Sons*, 318 U. S. 643, 652). With respect to the renewal of copyrights issued under the Revised Statutes some of these bills provided:[13]

> That the copyright subsisting in any work at the time when this Act goes into effect may, at the expiration of the renewal term provided for under existing law, be further renewed and extended by the author, if he be still living, or if he be dead, leaving a widow, by his widow, or in her default or if no widow survive him, by his children, if any survive him. * * *

The pertinent legislative history does not reveal whether the draftsmen of this section intended to restate what they considered to be the existing law, or whether they desired to correct what they considered to be a defect in it.

As finally enacted, the Copyright Act of 1909 abandoned the one long term of the early drafts and retained—although in a liberalized form[14]—

[13] S. 6330 and H. R. 19,853, 59th Cong., 1st Sess., Section 19 (Copyright Office Bulletin No. 12, p. 36-37); S. 8190, 59th Cong., 2d Sess., Section 18 (S. Rept. 6187, 59th Cong., 2d Sess., p. 19).

[14] The duration of the renewal term was extended from fourteen to twenty-eight years. Moreover, the renewal right was no longer limited to the widow or children. It was

the renewal term device of the earlier legislation. The pertinent provision of the 1909 Act (35 Stat. 1080) reads as follows: [15]

> * * * * the author of such work, if still living, or the widow, widower, *or* children of the author, if the author be not living, or if such author, widow, widower, or children, be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term * * *. [Emphasis added.]

The Act thus retained the formulation used in the 1870 Act which had been construed administratively as permitting the exercise of the renewal right by the widow or children. It did not adopt the language of the earlier draft bills which would have eliminated the uncertainties caused by the use of the ambivalent term "or".

The Committee Reports refer to the renewal provisions as follows: [16]

> * * *. Your committee do not favor and the bill does not provide for any extension

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extended to the widower, and in the absence of a surviving widow, widower, or children to the author's executor or next of kin depending on whether or not he left a will.

[15] Section 23, dealing with a copyright secured under the 1909 Act, and Section 24, referring to copyrights subsisting at the time the 1909 Act went into effect. Section 23 of the 1909 Act is now 17 U. S. C. 24; Section 24 of the 1909 Act was omitted as obsolete in 1947, cf. S. Rept. 663, 80th Cong., 1st Sess., pp. 19–20.

[16] H. Rept. 2222, 60th Cong., 2d Sess., pp. 14–15, and S. Rept. 1108, 60th Cong., 2d Sess., pp. 14–15. S. Rept. 1108 adopts H. Rept. 2222, see S. Rept. 1108, p. 1.

> of the original term of twenty-eight years, but it does provide for an extension of the renewal term from fourteen years to twenty-eight years; and it makes some change in existing law as to those who may apply for the renewal. Instead of confining the right of renewal to the author, if still living, or to the widow or children of the author, if he be dead, we provide that the author of such work, if still living, may apply for the renewal, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or, in the absence of a will, his next of kin. It was not the intention to permit the administrator to apply for the renewal, but to permit the author who had no wife or children to bequeath by will the right to apply for the renewal * * *
>
> Section 24 deals with the extension of copyrights subsisting when this act goes into effect and has the same provision regarding those who may apply for the extension of the subsisting term to the full term, including renewal, as is found in the preceding section regarding renewals generally.

In 1947, Congress enacted Title 17 of the United States Code into positive law; 17 U. S. C. 24 (*supra*, pp. 1–2) incorporated the language of the renewal provision of the 1909 Act without change. A bill introduced into the first session of the 83rd Congress by Congressman Walter, designed

to give the surviving spouse priority over the children, died in committee.[17]

The Regulations relating to the renewal of copyrights issued by the Copyright Office under the 1909 Act provided from 1910 until their repeal in 1948:[18]

> Application for the renewal or extension of a subsisting copyright may be filed within one year prior to the expiration of the existing term by:[19]
>
> (1) The author of the work if still living;

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[17] H. R. 2584, 99 Cong. Rec. 802. In 1950, a subcommittee of the Copyright Committee of the American Bar Association reported that:

"The question of whether the surviving spouse takes precedence over the children has never been settled. The more literal and equitable construction would seem to favor their being regarded as members of the same class * * *".

The full Copyright Committee commented that: "clarification of the renewal provisions in section 24 would be desirable and that the problem is an extremely difficult one. It * * * favors a number of its suggestions, but is forced to conclude that the matters presented are too difficult and too controversial to enable it to reach a conclusion in the short time at its disposal."

Report of Copyright Committee, Section of Patent, Trade-Mark and Copyright Law, American Bar Association, 23 (1950).

[18] Copyright Office Bulletin No. 15 (1910), Section 46; Copyright Office Bulletin No. 15 (1912 to 1938), Section 48, 37 C. F. R. (1938) 201.24. These were repealed in 13 F. R. 8648.

The Regulations issued under the 1947 Act, 37 C. F. R. (1949 Ed.), Parts 201 and 202, are far less detailed than the earlier ones and do not refer at all to copyright renewals.

[19] There are slight but inconsequential variations in the formulation of this initial paragraph.

(2) The widow, widower, or children of the author if the author is not living;

(3) The author's executor, if such author, widow, widower, or children be not living;

(4) If the author, widow, widower, and children are all dead, and the author left no will, then the next of kin.

(5) * * *[20]

The general instructions issued by the Copyright Office in its circular No. 15, "INSTRUCTIONS FOR SECURING REGISTRATION OF CLAIMS TO RENEWAL COPYRIGHT" in 1949, 1950, and 1953 continue the phraseology of the old regulations, and place the "widow, widower, or children," on the second step.[21]

Thus, insofar as registration of a claim to copyright is concerned, the recent circulars and the old regulations, like Copyright Office Bulletin No. 2, *supra*, p. 8, do not make the filing of a

[20] 37 C. F. R. (1938) 201.24, also contained a subparagraph (5) referring to the renewal of the copyrights in posthumous or composite works, and a paragraph (b) specifying the renewal fee.

[21] Circular No. 15, in use in 1949, provided in the part here pertinent:

"2. The widow, widower or children of the author, if the author is not living; * * *."

Circular No. 15, issued in 1950 and 1953, provides in the part here pertinent:

"b. If the author is not living, his widow (or widower) or children may claim renewal."

See App., *infra*, pp. 24–26, for the full text of the 1953 circular which is still in use.

renewal application by the child of a deceased author contingent upon the death of the author's widow or widower.[22]

Aside from the decision below, there are no direct judicial holdings to the effect that after the death of the author the surviving spouse and children share the renewal right. A number of opinions, however, contain general statements to the effect that, as far as the widow and children are concerned, the renewal provisions of the 1909 Act are virtually identical to those of the 1831 statute under which the right of renewal vested in the widow *and* children,[23] and that the subsequent legislation merely liberalized the benefits provided by the earlier Acts. *White-Smith Music Pub. Co. v. Goff*, 187 Fed. 247, 252 (C. A. 1);[24] *Danks* v. *Gordon*, 272 Fed. 821, 825 (C. A. 2); *M. Witmark & Sons* v. *Fred Fisher Music Co.*,

[22] It may be assumed that, in reenacting the Copyright Act in 1947, Congress recognized and confirmed the legitimacy of these regulations, instructions and circulars. Cf. *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 545; *Shapiro* v. *United States*, 335 U. S. 1, 16.

The administrative interpretations of the Copyright Act by the Register of Copyrights are entitled to the same weight as the interpretations by other agencies of the legislation administered by them. *Mazer* v. *Stein*, 347 U. S. 201, 211–213.

[23] See *supra*, pp. 5–6.

[24] "It [H. Rept. 2222, 60th Cong., 2d Sess.] explained positively sections 23 and 24 which are in issue here, and which, as we have shown, practically re-enact what had preceded them, beginning with the Act of 1831."

38 F. Supp. 72, 76 (S. D. N. Y.)[25] affirmed, 125 F. 2d 949 (C. A. 2), affirmed, 318 U. S. 643.[26] The opinion of this Court in *Fisher* v. *Witmark & Sons*, 318 U. S. 643, seems to rest on similar considerations. It also appears from the opinion in *Danks* v. *Gordon*, 272 Fed. 821, 825–826 (C. A. 2), that in 1912 a renewal copyright was taken out by the widow *and* children of the deceased author.[27]

In contrast, there are several general statements, again not directly involving the situation here in issue, to the effect that the renewal right belongs to the author, his widow, widower or children, executor, or next of kin in order of their enumeration.[28] *Silverman* v. *Sunrise Pictures Corp.*, 273 Fed. 909, 911 (C. A. 2), certiorari

[25] "... while the statute of 1831 is practically similar to the present statute on this point [the assignability of the author's renewal right.]"

[26] In *Harris* v. *Coca-Cola Co.*, 73 F. 2d 370, 371 (C. A. 5), the court stated "Later acts used the same expression, but added as beneficiaries the widow *and* children if the author be dead." (Emphasis added.)

[27] The records of the Copyright Office show many joint renewal applications filed by widow and children, and others in which the widow and children have filed separate applications for the same work. Because of the large number of renewal applications filed annually—19,519 during fiscal 1955 alone—it would require long research to determine which applications referred to the same work. Such a study would not reveal whether, when an application is received from widow or child alone, others in the class are still living.

[28] As respondent points out, these statements may be construed as considering the "widow, widower or children" as a single group.

denied, 262 U. S. 758; see also 28 Ops. Atty. Gen. 162, 165.

5. *Remarks on the Practice of the Copyright Office.* In the absence of a clear statutory provision or controlling decision, the Copyright Office might be said to have had three alternatives:

(1) The Office might have taken the position that it had no right to question any renewal claim, no matter how doubtful on its face. This would not only be unworkable in practice, but in direct conflict with the statute and the case law.[29]

(2) The Office might have taken the position that, under what is now Section 24, the widow took precedence over the children.

(3) The Office might have believed that Section 24 probably intended to treat widows and children as a single class for renewal purposes.

The second alternative *would probably* have resulted in refusal to register claims filed by the children while the widow was still alive; to take that position would have required a belief that there was no doubt that that was the meaning of Section 24 and would have foreclosed the issue. The third alternative permits the Office to register claims filed by either the widow or children, severally or jointly. Since the Copyright Office follows a general policy of resolving any substantial doubt in favor of registration, it

[29] Cf. *Mazer v. Stein*, 347 U. S. 201; *Bouve v. Twentieth Century-Fox Film Corp.*, 122 F. 2d 51, 53 (C. A. D. C.); *Brown Instrument Co. v. Warner*, 161 F. 2d 910, 911 (C. A. D. C.); 38 Ops. A. G. 162, 170.

could have granted registration in the name of the widow or children despite any belief on its part that the second or third alternative might be the better interpretation of Section 24. As we have pointed out, in the accepting of renewal applications the regulations of the Copyright Office have consistently placed both the widow and children within the second step, treating them as coming within one group for the purposes of registration.

A statement in "An Outline of Copyright Law" by Richard C. DeWolf, published in 1925, who later became Acting Register of Copyrights, has been cited to the contrary.[30] When he became Acting Register in 1944, Mr. DeWolf stated that, "My own view is that they (the widow and children) are members of one class; consequently, any member of the class may file application for

[30] At p. 66; cf. p. 277. Mr. DeWolf joined the Copyright Office in 1907, became a member of the bar in 1913, left the Office in 1918, and returned in 1923. See also Mr. DeWolf's comments on this point to the Practicing Law Institute: "* * * It seems not to have been definitely settled whether the widow takes precedence over the children, or whether widow and children together form a single class, all standing on the second step, so to speak. Punctuation would suggest the latter interpretation * * *" *Two Lectures on Copyright*, October 5 and 13, 1944, MS in Copyright Office Library, p. 26.

Nicholson, *A Manual of Copyright Practice* (2d Ed., 1956) 162 reads: "If there are both widow and children, renewal may be made by one on behalf of all * * *." (Cf. the quotation from the first edition in Petitioner's Brief, at p. 11. The Second edition was published after the filing of petitioner's brief).

renewal and thereby obtain a legal title * * *" [31]

The dissenting opinion in the court below raises a question as to whether the respondent has exhausted his administrative remedies, and appears to assume that the Copyright Office might have refused to register an application by the respondent. As the foregoing explanation makes clear, the Copyright Office would not have refused to register such applications. As a matter of fact, the Copyright Office has registered renewal claims in the name of Stephen William Ballentine.[32]

This memorandum does not urge that there can be no question as to the correct legal interpretation of Section 24. Nor does it go so far as to contend, as Mr. Samuel W. Tannenbaum asserted to the copyright bar in 1951, that treatment of a widow and children as a single class is the "only proper view." [33] Our purpose is to repeat what Mr. DeWolf said in 1944, that the Copyright Office "has never felt that the matter was clear enough to justify taking the position that a child

[31] For the full text of this letter, see App., *infra*, pp. 26–28. For the doctrine that any member of a class may file a renewal application, holding the legal title in trust for the other members of the class, see *Silverman* v. *Sunrise Pictures Corp.*, 273 Fed. 909 (C. A. 2); *Tobani* v. *Carl Fischer, Inc.*, 98 F. 2d 57, 59 (C. A. 2), certiorari denied, 305 U. S. 650.

[32] R–100799 (Oct. 10, 1952); R–139424 (Nov. 22, 1954); R–140294 (Dec. 9, 1954), and R–140926 (Dec. 27, 1954).

[33] Tannenbaum, Practical Problems in Copyright, in 7 Copyright Problems Analyzed, 7, 12 (CCH 1952).

could not renew so long as the widow was living,"[34]

Respectfully submitted.

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GEO. S. LEONARD,
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HERMAN MARCUSE,
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ABRAHAM L. KAMINSTEIN,
Chief, Examining Section,
Copyright Office.

APRIL 1956.

[34] See App., *infra*, p. 27.

APPENDIX

SEPTEMBER 5, 1952.

McCORMICK, NORRIS & HORGAN,
210 West Seventh Street,
Los Angeles 14, California.

Attention: Mr. Patrick D. Horgan.

GENTLEMEN: We must apologize for our delay in replying to your letter of August 21, 1952, in which you made general inquiries about two renewal problems—whether an author's widow takes a renewal in preference to his children, and whether an author's illegitimate child is to be regarded as one of his "children" for renewal purposes. In fairness, we feel we should mention that we have also received a letter from Mr. Leon E. Kent of Fink, Leventhal and Kent, making the same inquiry concerning the right of a child to claim jointly with a widow, and our answers to both of you will be virtually identical in this respect.

Before directly discussing your question, we believe that we should first explain that the Copyright Office is not a discretionary or quasi-judicial agency. We do not test the basic validity of copyright claims, but merely register them as long as they comply with the formal requirements of the law, either on their face or under the undisputed facts at our disposal. On the other hand, in performance of this more or less ministerial duty, we are sometimes required to construe the copyright law, in order to make

sure that an applicant falls within one of the classes of persons who are entitled to assert a claim. Thus, based upon legal research and analysis, we have established certain working principles as to the meaning of some undefined terms in the law. In setting up these principles, we have been guided by the rule that any substantial doubt should be resolved in favor of the applicant. For this reason, our decisions should not be regarded as definitive or official; they have been made, for the most part, in the absence of any judicial or higher administrative authority.

It has always been the position of the Copyright Office, as expressed in our information circulars and correspondence, that a deceased author's widow and children are to be regarded as a single class for renewal purposes, and that the widow takes no precedence over the children in asserting renewal claims. While the instructions appearing on page 2 (a) of Form R may not make this clear, the fact that the widow and the children are treated as separate, in stating the language to be used for asserting renewal claims, should not be interpreted as an implication that the one is to be preferred over the other. Our Circular 15 treats them as a single renewal category.

We express this position in daily practice by accepting the renewal claims of an author's widow, and those of his children, on the same application. It is perhaps significant in this connection, to note that if we regard two claims as basically conflicting, we will register them, but not on the same application. Likewise, we raise no question concerning joint widow-

children claims and register them without correspondence. This differs from cases where a claim is asserted contradicting one which has already been registered, since we make a practice of requesting an explanation in such instances, before proceeding with entry of the inconsistent claim.

This is not to say that we regard our position as the only possible one, or that we rule out the possibility that a court may adopt the opposite position. However, we do feel that, in the absence of any direct authority, our present position is more probably correct. Likewise, it accords with our rule of registering claims in doubtful cases since, if we adopted the opposite conclusion, we would be forced to reject outright the entry of certain claims.

There is no direct authority on this point, although the commentators seem to be in general agreement that the widow and children are to be regarded as a single class, and are to hold the benefits of the renewal as tenants in common. Concededly, the language of the statute is not without ambiguity, although perhaps the more persuasive construction would seem to treat the claimants as one group. On the other hand, at least one aspect of the legislative history of the provision appears to support our position. The present language of the Section was substituted for that used in an earlier draft of the statute, which read: "* * * that the copyright * * * may be further renewed and extended by his widow, or in her default or if no widow survive him, by his children." The fact that this specific provision was dropped in favor of the present language

could imply an intention to group the widow and children together.

Your question as to whether an illegitimate child is entitled to claim renewal as one of the "children" of the author represents a problem which, we believe, is far more uncertain and difficult than the one we have just discussed. Our position on the question cannot be regarded as settled, since we have seldom, if ever, been called upon to deal with this situation directly. On the other hand, we can at least discuss the problem hypothetically, in relation to certain working principles we have established.

First of all, it is quite probable that we have registered some renewal claims in the names of the illegitimate children of authors, without having any notice of that fact. This is because the basis of claim would be listed on the renewal form simply as "the child of the deceased author," and we would have no reason to look behind the claim. On the other hand, even if we were notified that the child was illegitimate, we feel that the claim should probably still be registered.

It could be argued that, since the meaning of the word "children" is undefined in the statute, its definition must be sought under the general common law rule of statutory construction, there being no federal common law. The general rule is evidently that, where no clear intention otherwise is displayed, illegitimate children are not to be considered "children." On the other hand, the applicability of this rule apparently varies from situation to situation and from jurisdiction to jurisdiction, and the reasons behind it may con-

flict with the congressional policy reflected in the renewal section. In view of the doubt surrounding this question, we are inclined to think that the Copyright Office might be exceeding its function if it refused registration in the name of an illegitimate child. Whether the claim would be held valid if tested in court is, to our mind, something of an open question.

We are enclosing duplicate copies of our Form R and circular 15 for your possible use.

Sincerely yours,

(S) GEORGE D. CARY,
Principal Legal Advisor.

Enclosures: 2 Forms R, 2 Circulars 15.

COPYRIGHT OFFICE
THE LIBRARY OF CONGRESS
WASHINGTON 25, D. C. No. 15

Instructions for securing registration of claims to renewal copyright.

The Copyright Law (Title 17, U. S. Code, §§ 24, 25) provides that the original term of copyright is for twenty-eight years. In the case of a work which was originally copyrighted in unpublished form, this term begins on the date on which registration was made in the Copyright Office. The copyright term for published works begins on the date of first publication.

The law also provides that the original copyright may be renewed for an additional twenty-eight years. Application for renewal copyright

should be filed on Form R, which is supplied by the Copyright Office upon request. Each application for renewal should be accompanied by the statutory fee of $1.00, but it is not necessary to send copies of the copyrighted work.

The copyright law prescribes that application for registration of renewal copyright must be made during the last year of the original twenty-eight year term, measured from the exact date on which the original copyright began. In other words, the application and fee should not be submitted until after the end of the twenty-seventh year of the first term, and they must be received in the Copyright Office before the end of the twenty-eighth year. If no application and fee are received, or if they are received after the original term has expired, the work falls into the public domain, and the copyright cannot then be revived.

The following persons are entitled to claim a renewal copyright:

1. Aside from the groups of works mentioned in paragraph 2, below, renewal copyrights in all works (including works by individual authors which appeared in periodicals or in cyclopaedic or other composite works), may be claimed by the following groups of persons:

a. The author of the work, if he is still living at the time when renewal is sought.

b. If the author is not living, his widow (or widower) or children may claim renewal.

c. If neither the author, his widow (or widower), nor any of his children are living, and the author left a will, the author's executor may claim renewal.

d. If the author died without leaving a will, and neither his widow (or widower), nor any of his children are living, his next of kin may claim renewal.

2. The proprietor of the copyright may claim renewal only in the case of certain groups of works, enumerated below. The term "proprietor" may be defined as the person owning the copyright at the time when application for renewal is made. The works which only the proprietor may renew are as follows:

a. Posthumous works, i. e., works published and copyrighted after the death of the author.

b. Periodicals and cyclopaedic or other composite works.

c. A work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author).

d. A work in which the original copyright was secured by the employer, for whom the work was made for hire.

Circular No. 15

APRIL 22, 1944.

LIGON JOHNSON, Esq.,
1619 Broadway, New York 19, N. Y.

DEAR MR. JOHNSON: I have your interesting letter of April 19.

The question of whether the widow takes precedence over the children in renewal copyrights has never been settled. My own view is that they are members of one class; consequently, any member of the class may file application for renewal and

thereby obtain a legal title, holding the renewal copyright in trust however for the other members of the class. It would seem to me that if it had been the intention to give the widow a right of renewal to the exclusion of the children the language of the section would have read that copyright could be renewed by the widow if the author is not living or, if neither author nor widow is living, then by the children, etc. The tenor of the discussions in regard to the renewal provisions, as you may recall, seems to emphasize the desirability of the author's being able to provide for his family. Let us suppose that an author has been married two or more times and that children survive him by an earlier marriage. Then do you think the law would intend the widow, i. e., the person who was his wife at the time of his death, to take the entire renewal copyright to the exclusion of the children?

The difficulty in giving a valid title to the renewal copyright under the terms of the existing law is obvious, and has frequently been brought to our attention. However, it would be almost as great if the question were one of a number of children as it is with the widow included along with the children. So, also, of the next of kin or indeed of several joint authors. I fear the difficulty is one inherent in the renewal provisions of the statute, and that if the Office were to take the position that the children could not share in the renewal rights so long as the widow remained alive, there would be just as much dissatisfaction as under the opposite view. At any rate, the Office has never felt that the matter was clear

enough to justify taking the position that a child could not renew so long as the widow was living. Our policy, as you know, is to register the renewal in the name of any beneficiary who seems reasonably entitled and leave the apportionment of interests among various beneficiaries to be settled by them or by a court if need should arise.

With best regards,

Sincerely yours,

RICHARD C. DEWOLF,
Acting Register of Copyrights.